

SECOND REGULAR SESSION

# SENATE BILL NO. 978

95TH GENERAL ASSEMBLY

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INTRODUCED BY SENATOR RUPP.

Read 1st time February 22, 2010, and ordered printed.

TERRY L. SPIELER, Secretary.

5091S.021

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## AN ACT

To repeal sections 375.1152 and 375.1155, RSMo, and to enact in lieu thereof three new sections relating to the treatment of qualified financial contracts, netting agreements, and other similar agreements in insurance insolvency proceedings.

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*Be it enacted by the General Assembly of the State of Missouri, as follows:*

Section A. Sections 375.1152 and 375.1155, RSMo, are repealed and three  
2 new sections enacted in lieu thereof, to be known as sections 375.1152, 375.1155,  
3 and 375.1191, to read as follows:

375.1152. For purposes of sections 375.570 to 375.750 and 375.1150 to  
2 375.1246, the following words and phrases shall mean:

3 (1) "Allocated loss adjustment expenses", those fees, costs or expenses  
4 reasonably chargeable to the investigation, negotiation, settlement or defense of  
5 an individual claim or loss or to the protection and perfection of the subrogation  
6 rights of any insolvent insurer arising out of a policy of insurance issued by the  
7 insolvent insurer. "Allocated loss adjustment expenses" shall include all court  
8 costs, fees and expenses; fees for service of process; fees to attorneys; costs of  
9 undercover operative and detective services; fees of independent adjusters or  
10 attorneys for investigation or adjustment of claims beyond initial investigation;  
11 costs of employing experts for preparation of maps, photographs, diagrams,  
12 chemical or physical analysis or for advice, opinion or testimony concerning  
13 claims under investigation or in litigation; costs for legal transcripts or testimony  
14 taken at coroner's inquests, criminal or civil proceedings; costs for copies of any  
15 public records; costs of depositions and court-reported or -recorded  
16 statements. "Allocated loss adjustment expenses" shall not include the salaries  
17 of officials, administrators or other employees or normal overhead charges such

**EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.**

18 as rent, postage, telephone, lighting, cleaning, heating or similar expenses;

19 (2) "Ancillary state", any state other than a domiciliary state;

20 (3) "Creditor", a person having any claim, whether matured or unmatured,  
21 liquidated or unliquidated, secured or unsecured, absolute, fixed or contingent;

22 (4) "Delinquency proceeding", any proceeding instituted against an insurer  
23 for the purpose of liquidating, rehabilitating, reorganizing or conserving such  
24 insurer, and any summary proceeding under sections 375.1160, 375.1162 and  
25 375.1164;

26 (5) "Director", the director of the department of insurance, financial  
27 institutions and professional registration;

28 (6) "Doing business" includes any of the following acts, whether effected  
29 by mail or otherwise:

30 (a) The issuance or delivery of contracts of insurance to persons resident  
31 in this state;

32 (b) The solicitation of applications for such contracts, or other negotiations  
33 preliminary to the execution of such contracts;

34 (c) The collection of premiums, membership fees, assessments, or other  
35 consideration for such contracts;

36 (d) The transaction of matters subsequent to execution of such contracts  
37 and arising out of them; or

38 (e) Operating under a license or certificate of authority, as an insurer,  
39 issued by the department of insurance, financial institutions and professional  
40 registration;

41 (7) "Domiciliary state", the state in which an insurer is incorporated or  
42 organized or, in the case of an alien insurer, its state of entry;

43 (8) "Fair consideration" is given for property or obligation:

44 (a) When in exchange for such property or obligation, as a fair equivalent  
45 thereof, and in good faith, property is conveyed or services are rendered or an  
46 obligation is incurred or an antecedent debt is satisfied; or

47 (b) When such property or obligation is received in good faith to secure a  
48 present advance or antecedent debt in an amount not disproportionately small as  
49 compared to the value of the property or obligation obtained;

50 (9) "Foreign country", any jurisdiction not in the United States;

51 (10) "Formal delinquency proceeding", any liquidation or rehabilitation  
52 proceeding;

53 (11) "General assets", all property, real, personal, or otherwise, not

54 specifically mortgaged, pledged, deposited or otherwise encumbered for the  
55 security or benefit of specified persons or classes of persons. As to specifically  
56 encumbered property, "general assets" includes all such property or its proceeds  
57 in excess of the amount necessary to discharge the sum or sums secured  
58 thereby. Assets held in trust and on deposit for the security or benefit of all  
59 policyholders or all policyholders and creditors, in more than a single state, shall  
60 be treated as general assets;

61 (12) "Guaranty association", the Missouri property and casualty insurance  
62 guaranty association created by sections 375.771 to 375.779, as amended, the  
63 Missouri life and health insurance guaranty association created by sections  
64 376.715 to 376.758, RSMo, as amended, and any other similar entity now or  
65 hereafter created by the laws of this state for the payment of claims of insolvent  
66 insurers. "Foreign guaranty association" means any similar entities now in  
67 existence or hereafter created by the laws of any other state;

68 (13) "Insolvency" or "insolvent" means:

69 (a) For an insurer issuing only assessable fire insurance policies:

70 a. The inability to pay an obligation within thirty days after it becomes  
71 payable; or

72 b. If an assessment be made within thirty days after such date, the  
73 inability to pay such obligation thirty days following the date specified in the first  
74 assessment notice issued after the date of loss;

75 (b) For any other insurer, that it is unable to pay its obligations when  
76 they are due, or when its admitted assets do not exceed its liabilities plus the  
77 greater of:

78 a. Any capital and surplus required by law for its organization; or

79 b. The total par or stated value of its authorized and issued capital stock;

80 (c) As to any insurer licensed to do business in this state as of August 28,  
81 1991, which does not meet the standards established under paragraph (b) of this  
82 subdivision, the term "insolvency" or "insolvent" shall mean, for a period not to  
83 exceed three years from August 28, 1991, that it is unable to pay its obligations  
84 when they are due or that its admitted assets do not exceed its liabilities plus any  
85 required capital contribution ordered by the director under any other provisions  
86 of law;

87 (d) For purposes of this subdivision "liabilities" shall include but not be  
88 limited to reserves required by statute or by the department of insurance,  
89 financial institutions and professional registration regulations or specific

90 requirements imposed by the director upon a subject company at the time of  
91 admission or subsequent thereto;

92 (e) For purposes of this subdivision, an obligation is payable within ninety  
93 days of the resolution of any dispute regarding the obligation;

94 (14) "Insurer", any person who has done, purports to do, is doing or is  
95 licensed to do insurance business as described in section 375.1150, and is or has  
96 been subject to the authority of, or to liquidation, rehabilitation, reorganization,  
97 supervision, or conservation by, any insurance department of any state. For  
98 purposes of sections 375.1150 to 375.1246, any other persons included under  
99 section 375.1150 shall be deemed to be insurers;

100 (15) **"Netting agreement":**

101 (a) **A contract or agreement, including terms and conditions**  
102 **incorporated by reference therein, including a master agreement which**  
103 **master agreement, together with all schedules, confirmations,**  
104 **definitions and addenda thereto and transactions under any thereof,**  
105 **shall be treated as one netting agreement, that documents one or more**  
106 **transactions between the parties to the agreement for or involving one**  
107 **or more qualified financial contracts and that provides for the netting,**  
108 **liquidation, setoff, termination, acceleration or close out under or in**  
109 **connection with one or more qualified financial contracts or present or**  
110 **future payment or delivery obligations or payment or delivery**  
111 **entitlements thereunder, including liquidation or close-out values**  
112 **relating to such obligations or entitlements, among the parties to the**  
113 **netting agreement;**

114 (b) **Any master agreement or bridge agreement for one or more**  
115 **master agreements described in paragraph (a) of this subdivision; or**

116 (c) **Any security agreement or arrangement or other credit**  
117 **enhancement or guarantee or reimbursement obligation related to any**  
118 **contract or agreement described in paragraph (a) or (b) of this**  
119 **subdivision; provided that any contract or agreement described in**  
120 **paragraph (a) or (b) of this subdivision relating to agreements or**  
121 **transactions that are not qualified financial contracts shall be deemed**  
122 **to be a netting agreement only with respect to those agreements or**  
123 **transactions that are qualified financial contracts;**

124 (16) "Preferred claim", any claim with respect to which the terms of  
125 sections 375.1150 to 375.1246 accord priority of payment from the general assets

126 of the insurer;

127 **(17) "Qualified financial contract", any commodity contract,**  
128 **forward contract, repurchase agreement, securities contract, swap**  
129 **agreement, and any similar agreement that the director determines by**  
130 **regulation, resolution, or order to be a qualified financial contract for**  
131 **the purposes of sections 375.1150 to 375.1246;**

132 **(a) "Commodity contract", shall mean:**

133 **a. A contract for the purchase of sale of a commodity for future**  
134 **delivery on, or subject to the rules of, a board of trade or contract**  
135 **market under the Commodity Exchange Act, 7 U.S.C. Section 1, et seq.,**  
136 **or a board of trade outside the United States;**

137 **b. An agreement that is subject to regulation under Section 19 of**  
138 **the Commodity Exchange Act, 7 U.S.C. Section 1, et seq., and that is**  
139 **commonly known to the commodities trade as a margin account, margin**  
140 **contract, leverage account, or leverage contract;**

141 **c. An agreement or transaction that is subject to regulation**  
142 **under Section 4c(b) of the Commodity Exchange Act, 7 U.S.C. Section**  
143 **1, et seq., and that is commonly known to the commodities trade as a**  
144 **commodity option;**

145 **d. Any combination of the agreements or transactions referred**  
146 **to in this paragraph; or**

147 **e. Any option to enter into an agreement or transaction referred**  
148 **to in this paragraph;**

149 **(b) "Forward contract", "repurchase agreement", "securities**  
150 **contract", and "swap agreement" shall have the meaning set forth in the**  
151 **Federal Deposit Insurance Act, 12 U.S.C. Section 1821(e)(8)(D), as**  
152 **amended;**

153 **[(16)] (18) "Receiver", a receiver, liquidator, administrative supervisor,**  
154 **rehabilitator or conservator, as the context requires;**

155 **[(17)] (19) "Reciprocal state", any state other than this state in which in**  
156 **substance and effect, provisions substantially similar to subsection 1 of section**  
157 **375.1176 and sections 375.1235, 375.1236, 375.1240, 375.1242 and 375.1244 have**  
158 **been enacted and are in force, and in which laws are in force requiring that the**  
159 **director of the state department of insurance, financial institutions and**  
160 **professional registration or equivalent official be the receiver of a delinquent**  
161 **insurer, and in which some provision exists for the avoidance of fraudulent**  
162 **conveyances and preferential transfers;**

163            [(18)] **(20)** "Secured claim", any claim secured by mortgage, trust deed,  
164 pledge, deposit as security, escrow, or otherwise, including a pledge of assets  
165 allocated to a separate account established pursuant to section 376.309, RSMo;  
166 but not including special deposit claims or claims against general assets. The  
167 term also includes claims which have become liens upon specific deposit claims  
168 or claims against general assets. The term also includes claims which have  
169 become liens upon specific assets by reason of judicial process;

170            [(19)] **(21)** "Special deposit claim", any claim secured by a deposit made  
171 pursuant to statute for the security or benefit of a limited class or classes of  
172 persons, but not including any claim secured by general assets;

173            [(20)] **(22)** "State", any state, district, or territory of the United States  
174 and the Panama Canal Zone;

175            [(21)] **(23)** "Transfer" shall include the sale and every other and different  
176 mode, direct or indirect, of disposing of or of parting with property or with an  
177 interest therein, or with the possession thereof, or of fixing a lien upon property  
178 or upon an interest therein, absolutely or conditionally, voluntarily, by or without  
179 judicial proceedings. The retention of a security title to property delivered to a  
180 debtor shall be deemed a transfer suffered by the debtor.

375.1155. 1. Any receiver appointed in a proceeding under sections  
2 375.1150 to 375.1246 may at any time apply for, and any court of general  
3 jurisdiction may grant, such restraining orders, preliminary and permanent  
4 injunctions, and other orders as may be deemed necessary and proper to prevent:

5            (1) The transaction of further business;

6            (2) The transfer of property;

7            (3) Interference with the receiver or with a proceeding under sections  
8 375.1150 to 375.1246;

9            (4) Waste of the insurer's assets;

10           (5) Dissipation and transfer of bank accounts;

11           (6) The institution or further prosecution of any actions or proceedings;

12           (7) The obtaining of preferences, judgments, attachments, garnishments  
13 or liens against the insurer, its assets or its policyholders;

14           (8) The levying of execution against the insurer, its assets or its  
15 policyholders;

16           (9) The making of any sale or deed for nonpayment of taxes or  
17 assessments that would lessen the value of the assets of the insurer;

18           (10) The withholding from the receiver of books, accounts, documents, or

19 other records relating to the business of the insurer; or

20 (11) Any other threatened or contemplated action that might lessen the  
21 value of the insurer's assets or prejudice the rights of policyholders, creditors or  
22 shareholders, or the administration of any proceeding under this act.

23 2. The receiver may apply to any court outside of the state for the relief  
24 described in subsection 1 of this section.

25 **3. Notwithstanding anything to the contrary in this section, the**  
26 **commencement of a delinquency proceeding under sections 375.1150 to**  
27 **375.1246 shall not operate as a stay or prohibition of any right to cause**  
28 **the netting, liquidation, setoff, termination, acceleration, or close out**  
29 **of obligations, or enforcement of any security agreement or**  
30 **arrangement or other credit enhancement or guarantee or**  
31 **reimbursement obligation, under or in connection with any netting**  
32 **agreement or qualified financial contract as provided for in section**  
33 **375.1191.**

375.1191. 1. Notwithstanding any other provision of sections  
2 375.1150 to 375.1246, including any other provision of sections 375.1150  
3 to 375.1246 permitting the modification of contracts, or other law of a  
4 state, no person shall be stayed or prohibited from exercising:

5 (1) A contractual right to cause the termination, liquidation,  
6 acceleration, or close out of obligations under or in connection with  
7 any netting agreement or qualified financial contract with an insurer  
8 because of:

9 (a) The insolvency, financial condition, or default of the insurer  
10 at any time, provided that the right is enforceable under applicable law  
11 other than sections 375.1150 to 375.1246; or

12 (b) The commencement of a formal delinquency proceeding  
13 under sections 375.1150 to 375.1246;

14 (2) Any right under a pledge, security, collateral, reimbursement,  
15 or guarantee agreement or arrangement or any other similar security  
16 arrangement or arrangement or other credit enhancement relating to  
17 one or more netting agreements or qualified financial contracts;

18 (3) Subject to any provision of section 375.1198, any right to set  
19 off or net out any termination value, payment amount, or other transfer  
20 obligation arising under or in connection with one or more qualified  
21 financial contracts where the counterparty or its guarantor is  
22 organized under the laws of the United States or a state or a foreign

23 jurisdiction approved by the Securities Valuation Office (SVO) of the  
24 NAIC as eligible for netting; or

25 (4) If a counterparty to a master netting agreement or a qualified  
26 financial contract with an insurer subject to a proceeding under  
27 sections 375.1150 to 375.1246 terminates, liquidates, closes out, or  
28 accelerates the agreement or contract, damages shall be measured as  
29 of the date or dates of termination, liquidation, close out, or  
30 acceleration. The amount of a claim for damages shall be actual direct  
31 compensatory damages calculated in accordance with subsection 6 of  
32 this section.

33 2. Upon termination of a netting agreement or qualified financial  
34 contract, the net or settlement amount, if any, owed by a nondefaulting  
35 party to an insurer against which an application or petition has been  
36 filed under sections 375.1150 to 375.1246 shall be transferred to or on  
37 the order of the receiver for the insurer, even if the insurer is the  
38 defaulting party, notwithstanding any walkaway clause in the netting  
39 agreement or qualified financial contract. For purposes of this  
40 subsection, the term "walkaway clause" means a provision in a netting  
41 agreement or a qualified financial contract that, after calculation of a  
42 value of a party's position or an amount due to or from one of the  
43 parties in accordance with its terms upon termination, liquidation, or  
44 acceleration of the netting agreement or qualified financial contract,  
45 either does not create a payment obligation of a party or extinguishes  
46 a payment obligation of a party in whole or in part solely because of  
47 the party's status as a nondefaulting party. Any limited two-way  
48 payment or first method provision in a netting agreement or qualified  
49 financial contract with an insurer that has defaulted shall be deemed  
50 to be a full two-way payment or second method provision as against the  
51 defaulting insurer. Any such property or amount shall, except to the  
52 extent it is subject to one or more secondary liens or encumbrances or  
53 rights of netting or setoff, be a general asset of the insurer.

54 3. In making any transfer of a netting agreement or qualified  
55 financial contract of an insurer subject to a proceeding under sections  
56 375.1150 to 375.1246, the receiver shall either:

57 (1) Transfer to one party, other than an insurer subject to a  
58 proceeding under sections 375.1150 to 375.1246, all netting agreements  
59 and qualified financial contracts between a counterparty or any

60 affiliate of the counterparty and the insurer that is the subject of the  
61 proceeding, including:

62 (a) All rights and obligations of each party under each netting  
63 agreement and qualified financial contract; and

64 (b) All property, including any guarantees or other credit  
65 enhancement, securing any claims of each party under each netting  
66 agreement and qualified financial contract; or

67 (2) Transfer none of the netting agreements, qualified financial  
68 contracts, rights, obligations or property referred to in subdivision (1)  
69 of this subsection, with respect to the counterparty and any affiliate of  
70 the counterparty.

71 4. If a receiver for an insurer makes a transfer of one or more  
72 netting agreements or qualified financial contracts, then the receiver  
73 shall use its best efforts to notify any person who is party to the netting  
74 agreements or qualified financial contracts of the transfer by 12:00  
75 noon, the receiver's local time, on the business day following the  
76 transfer. For purposes of this subsection, "business day" means a day  
77 other than a Saturday, Sunday, or any day on which either the New  
78 York Stock Exchange or the Federal Reserve Bank of New York is  
79 closed.

80 5. Notwithstanding any other provision of sections 375.1150 to  
81 375.1246, a receiver may not avoid a transfer of money or other  
82 property arising under or in connection with a netting agreement or  
83 qualified financial contract, or any pledge, security, collateral or  
84 guarantee agreement or any other similar security arrangement or  
85 credit support document relating to a netting agreement or qualified  
86 financial contract, that is made before the commencement of a formal  
87 delinquency proceeding under sections 375.1150 to 375.1246. However,  
88 a transfer may be avoided pursuant to section 375.1182 if the transfer  
89 was made with actual intent to hinder, delay or defraud the insurer, a  
90 receiver appointed for the insurer, or existing or future creditors.

91 6. (1) In exercising the rights of disaffirmance or repudiation of  
92 a receiver with respect to any netting agreement or qualified financial  
93 contract to which an insurer is a party, the receiver for the insurer  
94 shall either:

95 (a) Disaffirm or repudiate all netting agreements and qualified  
96 financial contracts between a counterparty or any affiliate of the

97 counterparty and the insurer that is the subject of the proceeding; or

98 (b) Disaffirm or repudiate none of the netting agreements and  
99 qualified financial contracts referred to in paragraph (a) of this  
100 subdivision, with respect to the person or any affiliate of the person.

101 (2) Notwithstanding any other provision of sections 375.1150 to  
102 375.1246, any claim of a counterparty against the estate arising from  
103 the receiver's disaffirmance or repudiation of a netting agreement or  
104 qualified financial contract that has not been previously affirmed in  
105 the liquidation or immediately preceding conservation or rehabilitation  
106 case shall be determined and shall be allowed or disallowed as if the  
107 claim had arisen before the date of the filing of the petition for  
108 liquidation or, if a conservation or rehabilitation proceeding is  
109 converted to a liquidation proceeding, as if the claim had arisen before  
110 the date of the filing of the petition for conservation or  
111 rehabilitation. The amount of the claim shall be the actual direct  
112 compensatory damages determined as of the date of the disaffirmance  
113 or repudiation of the netting agreement or qualified financial  
114 contract. The term "actual direct compensatory damages" does not  
115 include punitive or exemplary damages, damages for lost profit or lost  
116 opportunity or damages for pain and suffering, but does include normal  
117 and reasonable costs of cover or other reasonable measures of damages  
118 utilized in the derivatives, securities or other market for the contract  
119 and agreement claims.

120 7. The term "contractual right" as used in this section includes  
121 any right set forth in a rule or bylaw of a derivatives clearing  
122 organization, as defined in the Commodity Exchange Act, a multilateral  
123 clearing organization, as defined in the Federal Deposit Insurance  
124 Corporation Improvement Act of 1991, a national securities exchange,  
125 a national securities association, a securities clearing agency, a  
126 contract market designated under the Commodity Exchange Act, a  
127 derivatives transaction execution facility registered under the  
128 Commodity Exchange Act, or a board of trade, as defined in the  
129 Commodity Exchange Act, or in a resolution of the governing board  
130 thereof and any right, whether or not evidenced in writing, arising  
131 under statutory or common law, or under law merchant, or by reason  
132 of normal business practice.

133 8. The provisions of this section shall not apply to persons who

134 are affiliates of the insurer that is the subject of the proceeding.

135           **9. All rights of counterparties under sections 375.1150 to 375.1246**  
136 **shall apply to netting agreements and qualified financial contracts**  
137 **entered into on behalf of the general account or separate accounts if**  
138 **the assets of each separate account are available only to counterparties**  
139 **to netting agreements and qualified financial contracts entered into on**  
140 **behalf of that separate account.**

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